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FILED
JUL 9 2003
OFFICE OF THE CLERK

No. 02-1631

In the Supreme Court of the United States

RAMON PORTALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether federal agents violated petitioner's Fourth Amendment rights when, after making a controlled delivery of marijuana to petitioner's warehouse and without obtaining a search warrant, they unwrapped bundles in the warehouse that smelled of marijuana and were packaged like the marijuana in the controlled delivery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not published in the Federal Reporter, but is reprinted at 52 Fed. Appx. 290. The oral decision of the district court denying petitioner's motion to suppress (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2002. A petition for rehearing was denied on February 5, 2003 (Pet. App. C1). The petition for a writ of certiorari was filed on May 6, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to ten years' imprisonment, to be followed by a five-year term of supervised release, and fined $5000. The court of appeals affirmed in an unpublished order. Pet. App. A1-A2; Pet. 4.

1. Petitioner was a farmer and operated a pallet warehouse in Illinois. In 1999, during a commercial vehicle inspection, officers of the Missouri Highway Patrol found bundles of marijuana, wrapped in colored paper, hidden in a secret compartment in a truck carrying limes. The officers unwrapped one of the bundles, confirmed that it contained marijuana, re-wrapped it, returned it to the secret compartment, and resealed the compartment. The occupants of the truck agreed to assist authorities in making a controlled delivery of the marijuana to its intended destination, which was petitioner's farm in Illinois. Pet. App. A2.

When the occupants of the truck neared petitioner's farm, they were instructed by telephone to deliver the drugs to petitioner's warehouse, instead of his farm. Agents of the Drug Enforcement Agency (DEA) observed the truck's arrival at the warehouse and the unloading of pallets from the truck to the warehouse. The agents then saw three large crates being moved onto the truck and an individual take an extension cord into the back of the truck. Approximately an hour and a half later, the same individual brought another truck and a horse trailer to the warehouse. Believing that the

marijuana had been removed from the secret compartment and taken off of the truck in the crates, and was about to be loaded onto the horse trailer for shipment to another location such as petitioner's farm, the DEA agents entered the warehouse to make arrests. Pet. App. A3, B4-B5.

In the warehouse, the agents saw crates in which there were visible, block-shaped bundles wrapped in colored paper. From the smell of the bundles and their wrapping, the agents believed that, like the bundle that had been inspected in Missouri, they contained marijuana. Without obtaining a warrant, the agents opened some of the bundles and discovered marijuana. Petitioner was arrested at the warehouse. Pet. App. A3, B7-B8.

2. Before his trial, petitioner moved to suppress the marijuana seized from the warehouse, arguing in relevant part that the officers conducted a search in violation of the Fourth Amendment when they opened bundles in the warehouse without a warrant. The district court denied the motion to suppress. Pet. App. B1-B8. It determined that the agents had probable cause to believe that the marijuana concealed in the truck had been unloaded into the crates, which were then moved into the warehouse. *Id.* at B4-B5. The court further concluded that, after the horse trailer was backed up to the loading dock, exigent circumstances justified the agents' immediate entry into the warehouse to prevent the marijuana from being taken away. *Id.* at B5-B6. Finally, the court determined that after the agents lawfully entered the warehouse, they saw the bundles in plain view, and that the packaging of the bundles was consistent with a shipment of marijuana and with the particular marijuana inspected in Missouri. *Id.* at B7-B8. For those reasons, the court

concluded that the agents had probable cause to believe that the bundles "were forfeitable assets and, therefore, searchable at will." *Id.* at B8.

3. On appeal, petitioner conceded that the DEA agents' entry into the warehouse was lawful, and that the agents were entitled to seize the bundles that they observed in plain view. Pet. App. A4 n.1. Petitioner contended, however, that the agents violated his Fourth Amendment rights when they opened the wrapped bundles without a search warrant.[1]

The court of appeals assumed without deciding that petitioner was entitled to raise his Fourth Amendment claim, Pet. App. A5, and concluded that the agents' search of the bundles did not violate the Constitution, *id.* at A5-A6. The court relied on its earlier decision in *United States* v. *Thornton*, 197 F.3d 241 (7th Cir. 1999), cert. denied, 529 U.S. 1010 and 1022 (2000), which stated in the context of the discovery of a package in an automobile that, when police officers are aware of a "practical, nontechnical probability" that a package in plain view contains illegal drugs, they may seize and open the package without a warrant. *Id.* at 249. The court determined that such a "practical, nontechnical probability" existed in this case, because "[t]he Missouri Highway Patrol had discovered, and informed the DEA agents, that at least one of the bundles wrapped in colored paper held marijuana and, as [petitioner] admits, the agents smelled the odor of marijuana emanating from the packages." Pet. App. A6. Having affirmed the district court on that basis, the court of appeals determined that it was unnecessary to consider

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[1] Petitioner also raised sentencing issues in the court of appeals that are not at issue in this Court. See Pet. App. A6-A8.

whether the opening of the bundles also was justified by exigent circumstances. *Ibid.*

ARGUMENT

Petitioner renews in this Court his argument that the federal agents violated his Fourth Amendment rights when they made a warrantless opening of bundles of marijuana that the officers saw in the warehouse. As a general rule, law enforcement officers are required to obtain a search warrant before opening a closed container or package. See *United States* v. *Jacobsen*, 466 U.S. 109, 114 (1984); *United States* v. *Place*, 462 U.S. 696, 701 (1983). Cf., *e.g.*, *California* v. *Acevedo*, 500 U.S. 565 (1991) (permitting warrantless searches, upon probable cause, of containers found in automobiles). In this case, however, the warrantless search was consistent with the Fourth Amendment because the smell of marijuana, together with the Missouri Highway Patrol's earlier discovery of marijuana in one of the bundles in the truck, sufficiently established the contents of the bundles in the warehouse. The unpublished opinion of the court of appeals therefore does not warrant the Court's review.

1. Under the Fourth Amendment, "certain containers may not support a reasonable expectation of privacy because their contents can be inferred from their outward appearance." *United States* v. *Johns*, 469 U.S. 478, 486 (1985). For example, the "distinctive configuration" of a package, or the transparency of a container, may "proclaim[] its contents." *Robbins* v. *California*, 453 U.S. 420, 427 (1981) (opinion of Stewart, J.); see *Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979). In such a case, a search does not intrude upon any privacy interest protected by the Fourth Amendment, because the contents of the container "cannot

fairly be said to have been removed from a searching officer's view" before the search. *Robbins*, 453 U.S. at 427 (opinion of Stewart, J.).

In *Johns*, this Court, after noting the principle that containers that proclaim their contents are not protected by a legitimate expectation of privacy, stated that it is "debatable" whether an expectation of privacy attaches to a package "reeking of marihuana" and, therefore, whether a warrantless search would be permissible on the basis of the package's "plain odor." 469 U.S. at 486; cf. *id.* at 489 (Brennan, J., dissenting) (criticizing majority for "suggest[ing] a very definite view" that such a warrantless search would be permissible). Several courts of appeals have concluded that a warrantless search is permissible in that situation. See *United States* v. *Williams*, 822 F.2d 1174, 1182 (D.C. Cir. 1987) ("[N]o reasonable expectation of privacy attaches to containers whose contents are readily discernible through use of some sense other than sight."); *United States* v. *Lueck*, 678 F.2d 895, 903 (11th Cir. 1982); *United States* v. *Haley*, 669 F.2d 201, 203-204 & n.3 (4th Cir.), cert. denied, 457 U.S. 1117 (1982). We are unaware of any court of appeals decision after *Johns* that adopts the opposite view.[2]

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[2] In its own decision in *United States* v. *Johns*, the Ninth Circuit rejected the view that an odor of marijuana emanating from a package obviates the need for a warrant. 707 F.2d 1093, 1095-1096 (1983). Shortly after this Court's decision in *Johns*, however, the Ninth Circuit suggested that the warrantless search of a plastic bag might have been valid if the bag had "a distinctive * * * odor that identified its contents." *United States* v. *Miller*, 769 F.2d 554, 560 (9th Cir. 1985). *United States* v. *Dien*, 609 F.2d 1038 (1979), modified, 615 F.2d 10 (2d Cir. 1980), which is a pre-*Johns* decision, has been cited as rejecting the "plain odor" doctrine. See, *e.g.*, *Johns*, 469 U.S. at 489 (Brennan, J., dissenting). There, however,

In this case, a federal agent testified at petitioner's trial that he smelled the odor of marijuana emanating from the wrapped bundles in the warehouse. C.A. App. 231.[3] Petitioner agreed in the court of appeals that the bundles smelled of marijuana. See Pet. App. A3. Under the circumstances, petitioner had no reasonable expectation of privacy in the bundles, and the agents acted within their constitutional authority in unwrapping some of the bundles without a search warrant.[4]

2. The judgment below also is correct under *Illinois* v. *Andreas*, 463 U.S. 765 (1983). In *Andreas*, the Court concluded that the defendant had no cognizable privacy interest in a container after government agents lawfully opened it and identified its contents as contraband. Therefore, the Court determined that absent a substantial likelihood that the contents of the container were changed after the initial opening by the agents, the agents' reopening of the container following a controlled delivery did not violate the defendant's Fourth Amendment rights. *Id.* at 769-773.

Petitioner argues (Pet. 12-13 n.7) that *Andreas* is inapposite because the agents in this case could not have been certain that the bundles they saw in the ware-

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the Second Circuit concluded that the odor of marijuana might not have come from the cartons that were searched. 609 F.2d at 1045.

[3] Although the government did not show at the suppression hearing that the bundles smelled of marijuana, see Pet. App. B6, the court of appeals correctly considered the trial evidence when determining that the search was valid. See *Carroll* v. *United States*, 267 U.S. 132, 162 (1925).

[4] Because both the district court and the court of appeals rejected petitioner's claim that the opening of the bundles violated the Fourth Amendment, neither had any occasion to consider the possible significance of the fact that the agents opened only some of the bundles at the warehouse.

house were the same ones that the Missouri Highway Patrol had discovered in the truck. The district court, however, determined that the facts available to the DEA agents would have led "any reasonable person" to conclude that the marijuana bundles were removed from their hiding place in the truck and taken into the warehouse in crates. Pet. App. B5. Further supporting that conclusion, the bundles in the warehouse smelled of marijuana and were wrapped in the same way as the marijuana bundles in the truck. See *id.* at A6. Under the circumstances, the agents could reasonably conclude that the bundles in the warehouse came from the truck. In fact, although the court of appeals deemed it unnecessary to apply *Andreas* because it rejected petitioner's Fourth Amendment argument on other grounds, it noted that "[t]he agents' search of the packages likely qualifies as a controlled delivery under *Andreas*." *Id.* at A6 n.2.

3. Petitioner's suggestion (Pet. 10-11) that the court of appeals' unpublished decision in this case conflicts with decisions of other courts of appeals is incorrect. In the cases on which petitioner relies, the courts applied the general rule that a closed container, although properly seized by law enforcement officers, may not be opened without a search warrant. See *United States* v. *Doe*, 61 F.3d 107, 110-111 (1st Cir. 1995); *United States* v. *Villarreal*, 963 F.2d 770, 774 (5th Cir. 1992); *United States* v. *Donnes*, 947 F.2d 1430, 1436-1437 (10th Cir. 1991). None of those cases involved a situation in which the odor or some other characteristic of the container revealed its contents, or in which the container was reopened following a controlled delivery. Furthermore, the unpublished decision of the court of appeals in this case lacks precedential value under Seventh Circuit

Rule 53(b)(2)(iv), see Pet. App. A1, and it therefore cannot create a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2003